



IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-887

LENDALL B. TERRY,
Petitioner,

vs.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA
BRIEF FOR RESPONDENT, INDIANA
SUPREME COURT DISCIPLINARY
COMMISSION, IN OPPOSITION

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I.

Opinion Below

The Indiana Supreme Court Disciplinary Commission
agrees that the opinion below is correctly set forth as
Appendix A to the Petitioner's brief.

II.

Statement of Jurisdiction

The Respondent disagrees with the Petitioner's
summary of the reasons why the Petitioner was disbarred

in the disciplinary proceeding below, it being the belief of the Respondent that such summary is incomplete. The opinion of the Supreme Court of the State of Indiana speaks for itself as to the factual and legal basis for the disbarment order. Otherwise, the jurisdictional requisites are adequately set forth in the Petition.

III.

Question Presented

The Respondent disagrees with the Petitioner's statement of the question presented by this Petition.

The decision and opinion of the Supreme Court of Indiana disbarring the Petitioner, as well as the Petition for Writ of Certiorari and accompanying Appendix filed by the Petitioner, give rise in the opinion of the Respondent to the following question:

(1) Whether an Indiana attorney may be disbarred or otherwise disciplined by the Indiana Supreme Court as a consequence of his making false accusations of criminal conduct against a Justice of the Indiana Supreme Court, which accusations were made without probable cause or legal proof, and which accusations exhibited a reckless disregard of the truth, and which accusations were designed to require the disqualification of such Justice from considering the attorney's then pending petition before such Court to be reinstated to the office of the Circuit Judge.

IV.

Constitutional Provisions, Statutes And Court Rules Involved

The Petitioner has fairly summarized those provisions of the various Constitutional provisions, statutes and Court rules he claims have application to the questions presented. Respondent, for its part, would additionally draw to the Court's attention the following pertinent provisions of

Ethical Consideration 8-6 of the Indiana Code of Professional Responsibility for Attorneys at Law:

"Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

V.

Statement Of The Case

The Petitioner's statement of the case adequately and concisely summarizes the facts material to the consideration of the question presented.

VI.

Reasons For Denying The Writ

The Petitioner's sole posture in this Court is that the First Amendment wholly immunizes an attorney at law from making false accusations of criminal conduct against a Justice of the Supreme Court of Indiana. The Petitioner erroneously, and without support from the record, asserts that the charges made by the Petitioner against the Justice were made "with a reasonable belief that those charges were true". See Petitioner's brief, p. 17. The opinion below, which adopted *in toto* the findings of its Hearing Officer, makes abundantly clear that the Petitioner possessed no reasonable belief that the charges he was making were true. In this connection, the Hearing Officer found as follows with respect to the Petitioner's claim that his conduct was motivated by a reasonable belief:

"14. As found above, the Respondent wholly lacked probable cause to make the above allegations against Justice Hunter. The Respondent, although given ample opportunity to do so, has not provided this Hearing Officer with any *facts* to substantiate his grossly disrespectful allegations against Justice Hunter. Respondent utterly failed to produce any evidence that would tie Justice Hunter into the convoluted theory of conspiracy Respondent contends Justice Hunter masterminded to protect Batesville attorney, William Greeman, from criminal prosecution of an alleged forgery that two separate grand juries, in 1974 and 1976, investigated and returned a 'no indictment'.

"15. As justification for what this Hearing Officer finds to be false accusations against Justice Hunter, the Respondent refers to those actions taken by Justice Hunter as a member of this Court, referred to in Findings 3, 4 and 5 hereof, including authoring the majority opinion which suspended him from judicial office.

"16. The timing of Respondent's widely publicized accusations against Justice Hunter occurred shortly after Respondent filed his petition to terminate his suspension as judge of the Ripley Circuit Court and was designed to force Justice Hunter into disqualifying himself or being disqualified to consider Respondent's petition.

"17. Regardless of whether or not Respondent believed the false accusations he leveled against Justice Hunter, his conduct exhibited a reckless disregard of the truth."

See Petitioner's brief, Appendix B, pp. A-17 to A-18. The Petitioner has made no effort in his petition to demonstrate that the record of this proceeding fails to wholly support the above findings of the Hearing Officer and Court. Thus, the First Amendment issue raised by the Petitioner in this cause must be considered against the backdrop of the above undisputed facts.

The Petitioner's brief before this Court glaringly omits reference to the substantial body of substantive law which has developed during the past century regarding the discipline of attorneys at law for improper criticism of judicial conduct. The petition is incorrectly premised on the assumption that the Petitioner's actions must be judged solely by the law applicable to defamation cases generally rather than by the standards of conduct which govern attorneys at law in Indiana and elsewhere.

The Respondent's actions in this case were judged by the Supreme Court of Indiana in the light of the provisions of the *Indiana Code of Professional Responsibility for Attorneys at Law* and by the Petitioner's *Oath as Attorney*.

Disciplinary Rule 8-102(B) of the Code provides that:

"A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

The Ethical Considerations of the Indiana Code constitute a body of principles upon which the lawyer can rely for guidance in many situations, including the one presently before this Court. Ethical Consideration 8-6 states, in part:

"Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

The Respondent's *Oath as Attorney* provides in pertinent part:

"I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to

me to be unjust...and never seek to mislead the court or jury by any artifice or false statement of fact or law...I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest."

The above quoted Disciplinary Rule and Ethical Considerations for attorneys at law are neither novel nor new. They are an embodiment of the former Canon 1 of the *Canons of Professional Ethics of the American Bar Association* which read as follows:

"It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

As Justice Stewart stated in the case of *In Re Sawyer* (1959), 360 U.S. 622, 79 S.Ct. 1376, 1388, 3 L.Ed.2d 1473, 1489:

"A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." (Emphasis added)

A lawyer, acting in a professional capacity, has fewer rights of free speech than would a private citizen. As was explained in *In Re Woodward* (Mo., 1957), 300 S.W.2d 385:

"Neither the right of free speech nor the right to engage in 'political' activities can be so construed or extended as to permit any such liberties to a member of the bar; respondent's action was in express and exact contradiction of his duties as a lawyer. *A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.*" (Emphasis added)

Attorneys should always be free to criticize the law, but attorneys traditionally have not been permitted, without just cause, to criticize the motives, integrity or competency of judges. In the case of *Attorney General v. Nelson* (1933), 263 Mich. 686, 249 N.W. 439, the Court said:

"Courts generally recognize that the public, and this includes the attorneys, has the right to criticize their opinions, and such criticism, when fairly indulged in, does not subject an attorney to discipline by the court, but such criticism must not go so far as to attack the integrity of the judge who has rendered the decision. ***but this privilege does not carry with it the right to charge fellow attorneys and the presiding judge with conspiracy and corruption, when there is no adequate basis for such a charge. *In re Mains*, 121 Mich. 603, 610, 80 N.W. 714, 717."

In *State ex rel. Florida Bar v. Calhoon* (1958), ____ Fla. ____, 102 S.2d 604, a case wherein an attorney had falsely accused a judge of gross misconduct, the Florida court said:

"It would be contrary to every democratic theorem to hold that a judge or a court is beyond bona fide comments and criticisms which do not exceed the bounds of decency and truth or which are not aimed at the destruction of public confidence in the judicial system as such. However, when the likely impairment of the administration of justice is the direct product

false and scandalous accusations then the rule is otherwise. 5 Am.Jur., Attorneys at Law, Sec. 266, p. 420."

The general principles outlined above have *not* been modified by the rule of *New York Times Co. v. Sullivan* (1964), 376 U.S.254, 84 S.Ct. 710, 11 L.Ed.2d 686, or its progeny. As the Second Circuit Court of Appeals had occasion to observe in the case of *In Re Whiteside* (1967), 386 F.2d 805, at page 806, footnote 4:

"4. Appellant suggests that the rule of *New York Times Co. v. Sullivan*, 376 U.S.254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), immunizes him from disciplinary proceedings for his misconduct in persisting to make broadside attacks of grossly disrespectful proportions. We need not decide whether the *New York Times* rule applies to disciplinary proceedings against a lawyer for statements made in the course of litigation since, in any event, the allegations made by appellant would not be protected under that rule. The appellant, although given the opportunity to do so, adduced no facts to support his claim that the judges who ruled against his clients were conspiring to conceal the facts concerning an alleged murder. Surely to make such accusations—with no facts to substantiate them—simply because the judges ruled against his clients, exhibits a reckless disregard of the truth which would preclude protection under the rule of *New York Times*."

Unfounded criticism of judicial acts by attorneys at law has been the subject of a number of reported cases. See, e.g., the numerous cases collected at 7 Am.Jur.2d, *Attorneys at Law*, §9, and Annot., *Attorney's Criticism of Judicial Acts as Ground of Disciplinary Action*, 12 A.L.R.3d 1408, and 27 L.Ed.2d 953. The following discussion focuses upon several of such reported cases which in the opinion of the Respondent are pertinent to the issues before this Court.

The case of *In Re Glenn* (1964), 256 Iowa 1233, 130 N.W.2d 672, was a disciplinary action against a practicing Iowa attorney. Glenn had printed and circulated a leaflet

stating that a municipal judge proved not only that justice was blind but was also deaf and dumb, and that the subject municipal judge wished to deny litigants fair trial on appeals. Glenn had also accused the municipal court judge of being subject to the control of certain city and county officials. Glenn claimed that he was within his right of free speech to criticize the court and to speak fully regarding judicial acts and conduct. Glenn did not have any proof, other than his own unsupported suspicions, of his allegations. The Iowa Supreme Court ruled as follows:

"We have no hesitancy in finding that the leaflet went much farther than the accused, as a lawyer, had a right to go. He offered no evidence that Judge Dullard was ordered to prevent an appeal, or that he was under the control of any outside officials. We have no occasion to pass upon the question whether if he had been able to prove his charges the publication would have been justified; although if he had such evidence, proper ways were available to him to obtain a remedy. The entire publication evidences a desire on the part of the accused to belittle and besmirch the court and to bring it into disrepute with the general public. The trial court properly found it reprehensible, and acted accordingly." 130 N.W.2d at 676.

The case of *In Re Meeker* (1966), 76 New Mexico 354, 414 P.2d 862, involved a New Mexico attorney who had charged that three Justices of the New Mexico Supreme Court had conspired to deny him a fair and impartial review in a suit which he had brought in his own behalf and that they had misstated and distorted the facts so as to allow the cause to fail on a legal technicality. The New Mexico Supreme Court held that the Oath of an attorney is a solemn and sacred obligation, not to be lightly dealt with or disregarded. The Court further stated that the Canons of professional ethics must be enforced and respected by members of the bar if public confidence in the integrity and impartiality of the administration of justice was to be maintained.

The case of *In Re Whiteside, supra*, bears certain similarities to the proceeding before the Court in this case. The subject case was an appeal from an order of the Federal District Court for the District of Connecticut disbarring Whiteside from practice before that Court. Whiteside had filed a complaint in District Court charging a conspiracy between a group of lawyers, a State's attorney, a Deputy Coroner, and various Connecticut judges, including all five judges of the Connecticut Supreme Court of Errors. Whiteside's contention was that numerous Connecticut judges had entered into a conspiracy to conceal a murder by the actions taken by such judges in connection with litigation pending before them. The Court affirmed the order of disbarment and held that the grossly disrespectful allegations, repeatedly made, were so totally unfounded and so clearly in violation of professional ethics as to justify disbarment.

The case of *In Re Frerichs* (1976), _____ Iowa _____, 238 N.W.2d 764, involved a disciplinary proceeding instituted against an attorney who, in filing a petition for rehearing before the Iowa Supreme Court for a client, asserted that the Supreme Court had engaged in conduct amounting to fraud and deceit in its review of the factual record and in its decision. The Iowa Supreme Court found that Frerichs' conduct violated both his Oath as an attorney and Disciplinary Rule 8-102(B) of the Iowa Code of Professional Responsibility. The Court held that Frerichs' charges against it alleged, in substance, the commission of state and federal criminal offenses and attributed to the Court sinister, deceitful and unlawful motives and purposes. The Court further found that such charges, recklessly made, were not protected by freedom of speech guarantees and were the proper subject of disciplinary action.

The case before this Court presents a classic case of an attorney making false and slanderous accusations against a judicial officer without probable cause and without any reasonable belief in the accuracy of the statements. The

Petitioner has not shown that the Court even a single fact or circumstance that would even have remotely suggested to a reasonable person that the subject Justice of the Indiana Supreme Court knowingly had committed illegal conduct. The Respondent clearly violated his *Oath as Attorney* and the *Indiana Code of Professional Responsibility for Attorneys at Law* when he made grossly disrespectful and slanderous allegations against a Supreme Court Justice in connection with a matter that was then pending before the Supreme Court of Indiana for adjudication. The Petitioner was bound by the ethical precepts of his profession and such precepts, under the facts and circumstances shown by the record in this case, required his abstention from making the subject allegations of alleged criminal misconduct.

VII. Conclusion

The decision below is correct. For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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